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No. 83-245

In the**Supreme Court of the United States**OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
*Appellant**vs.***R.A. GRAY & COMPANY,***Appellee*

**On Appeal From the United States Court of Appeals
For the Ninth Circuit**

[REDACTED]
**BRIEF OF NATIONAL
ASSOCIATION OF WHOLESALER-DISTRIBUTORS
AS AMICUS CURIAE IN SUPPORT OF APPELLEE**

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QUESTIONS PRESENTED

This case presents questions which go to the very heart of the constitutional guarantees of due process in matters involving Congressional passage of legislation on a retroactive basis. The primary question is:

- I. Whether the retroactive provisions of the Multiemployer Pension Plan Amendments Act deny due process by impairing existing and vested rights which have been exercised prior to enactment.
- II. A closely related question is whether the legislative process denies the opportunity of fair notice to predict the exact content of future laws with retroactive provisions so as to interfere with the constitutional right to rely upon and act within the law as it exists prior to passage of such retroactive legislation in the exercise of a vested right.

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**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

National Association of Wholesaler-Distributors, a national trade association, respectfully moves this Honorable Court for leave to file the attached brief as amicus curiae. The attorneys of record for the Appellant and the Appellee have consented to such filing.

The National Association of Wholesaler-Distributors (NAW) is a federation of approximately 122 national

wholesale-distribution trade associations representing, in the aggregate, over 50,000 employers nationwide. Participating in this brief amicus with NAW are Woodworking Machinery Distributors Association, Wine and Spirits Wholesalers of America, National Building Materials Distributors Association and National Wholesale Drug-gists' Association.

Wholesale-distribution is a critical link in the marketing chain with 1982 sales in excess of \$1.4 trillion, providing employment of 5.4 million Americans at over 300,000 locations throughout the country. While the composite sales and employment statistics attest to the vital role of wholesale-distribution, the fact is that the vast majority of firms in the industry tend to be small to medium, closely held, family owned businesses. NAW member companies are subject to the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

The decision in this case is one which transcends in importance the interest of the immediate litigants. The ability of the small businessman to make decisions based upon current law is of paramount importance. In today's economic environment, the retroactive application of changes in the law can have a severe financial impact not only on past and completed transactions, but on future decisions as well.

In view of these facts, Petitioner believes that an analysis of the issues by counsel representing the wholesale-distribution industry will be helpful to this Court. Therefore, Petitioner respectfully requests leave to file

instanter its brief urging affirmance of the decision of the United States Court of Appeals, Ninth Circuit, and in support of R.A. Gray & Company, Appellee herein.

Respectfully submitted,

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BRIEF OF NATIONAL ASSOCIATION OF
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SUMMARY OF THE ARGUMENT

I.

Constitutional guarantees of due process impose substantial restrictions on Congressional power to enact legislation on a retroactive basis. Where the retroactive provisions of a statute impair existing and vested rights which have been exercised prior to enactment, due process is denied. Only in strictly limited situations involving

the exercise of emergent or police powers have any retroactive invalidations of vested rights been upheld. Due process requirements are of the essence and are controlling in any determination of the validity of statutory enactments with retroactive application. The Multiemployer Pension Plan Amendments Act cannot be characterized as an exercise of emergent or police powers. The Act denies due process by retroactively invalidating the exercise of vested rights and by imposing new obligations with respect to transactions already past.

II.

The elongated, deliberative and inconstant legislative process by which the Multiemployer Pension Plan Amendments Act became law did not afford opportunity for fair notice to predict the exact content of its final retroactive provisions. Clairvoyance is not an ingredient of reasonable reliance. Without fair notice of future laws with retroactive provisions, a party may reasonably rely upon and exercise vested rights, rights within the law as it exists at the specific point in time of such exercise.

ARGUMENT

I.

THE RETROACTIVE PROVISIONS OF THE MULTI-EMPLOYER PENSION PLAN AMENDMENTS ACT DENY DUE PROCESS BY IMPAIRING EXISTING AND VESTED RIGHTS WHICH HAVE BEEN EXERCISED PRIOR TO ENACTMENT.

Courts and commentators have repeatedly asserted that the constitutionality of retroactive legislation usually turns on the issue of due process. Several factors affect this constitutional calculus under the due process clause. Such factors include the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right and the nature of the right which the statute alters.

Factors favoring retroactivity generally include surrounding circumstances of an emergency nature, such as the exercise of police power or war powers. Counter-vailing considerations include the extent of reliance upon existing law and the reasonableness of such reliance, the nature of the right affected by the legislation and the extent of abrogation of that right. Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 Colum. L.Rev. 1105, 1111-1113 (1963).

Where the statute does not represent a legislative exercise of police or emergent power and where there is a reasonable reliance on existing law in the exercise of a vested right, a retroactive invalidation of the exercise of that vested right is a denial of due process.

A retroactive law is one which takes away or impairs rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already past. *Pan Am Petroleum Corp. v. Gibbons*, 168 F.Supp. 867 (D.C. Utah, 1958), *Aff'd* 262 F.2d 852 (10th Cir. 1958). Such legislation has not been favored and will be given retroactive effect only where it clearly does not impinge upon constitutional protection. *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412 (D.C. MD. 1947), *Aff'd* 168 F.2d 58 (4th Cir. 1948). In *Seese*, the court clearly distinguished between rights given by statute and basic vested property rights that arise independent of statutory enactment. In that case rights to overtime pay under an Act of Congress that had been modified to change the specific statutory overtime pay rights at issue were the subject of the litigation. The court held that the rights sued on were *not vested rights, protected by the fifth amendment*, but instead were rights given by statute and thus subject to subsequent legislative enactment extinguishing such rights.

Thus, vested, protected property rights were and have been accorded superior priority in any determination of due process guarantees. In *Lynch v. United States*, 292 U.S. 571 (1933), this court ruled that private contract rights under war risk insurance were protected against a repealing Act holding that the Due Process Clause prohibits the Congress from annulling them unless within the police power. Reference was made to the sound principle of law found in decisions made in *Duke Power Co. v. South Carolina Tax Commission*, 81 F.2d 513 (4th Cir. 1936) and *Wright v. Union Central Life Insurance Company*, 311 U.S. 273 (1940) that

"It is a sound principle of constitutional law that retroactive legislation in general will not be allowed to impair rights which can truly be said to be vested rights of a nature constituting property rights."

The distinction of permissible retroactive application in matters involving exercise of the police power is an important one. In *Usery v. Turner Elkhorn Mining, Co.*, 428 U.S. 1 (1976), a mining safety law that imposed liability on employers for disabilities incurred by employees prior to the date of enactment of the statute was upheld by this court as a statute that was remedial in nature. The statute in question was found to be a rational measure, taken under the police power, where an overwhelming public interest was present.

The case of *Darlington, Inc. v. FHA*, 142 F.Supp. 341, (E.D. S.Car. 1956) *Rev'd on other grounds*, 352 U.S. 977 (1957) is particularly pertinent on this point. In that case, a 1954 amendment to the National Housing Act that restricted the use of rental units for transient purposes and which was enacted subsequent to the chartering of the rental corporation and the transient renting of its units, was held not to have retroactive application to the transient rentals prior to enactment. The decision reiterated the basic constitutional principle that a statute cannot validly create new obligations with respect to past transactions. The court noted that the case did not involve the legislative exercise of police power—war power—zoning laws—tariff laws—export and import licensing—emergent or tax legislation, each of which had been the basis for upholding a retroactive feature of a law.

Instead the court said, at p. 351, that

"To open an avenue for retroactive or retrospective laws in the field of contract not dealing with police, war or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects *In substance, there must be a stopping point somewhere*" (Emphasis supplied)

That stopping point is particularly visible in the retroactive invalidation issue now before this court. There is no exercise of police, war or emergent powers here. In its decision, the Ninth Circuit Court of Appeals included a finding that

"The withdrawal liability imposed on the employers for their pre-Amendments Act termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans. Those withdrawing prior to enactment of the Amendments Act were still contingently liable under ERISA" *Shelter Framing Corporation v. Pension Benefit Guaranty Corporation*, 705 F.2d 1502 (9th Cir., 1983), at page 1514

The critical issue then is whether any law not based on emergent or police power consideration should be granted retroactive effect where the application of the law acts to impair existing and vested rights.

Where an employer's obligation under a collective bargaining agreement to contribute to a pension plan terminates by reason of non-renewal of the collective bargaining agreement, that employer has a fixed right of

present or future enjoyment to discontinue such contributions; an existing and vested right. Where that vested right is retroactively taken away by subsequent legislative enactment, there is an unconstitutional impairment of that vested right.

A statute may not be given retroactive application if its effect will be the impairment of a vested right. *Rios v. Jones*, 323 N.E.2d 380 (1974), *Rev'd* 348 N.E.2d 825 (1976), *App. Dism'd* 429 U.S. 934 (1976). Adoption of a new law can have no retrospective operation so far as vested rights are concerned. *Lubezny v. Ball*, 53 N.E.2d 988 (1944), *Rev'd* 59 N.E.2d 645 (1945).

Where, as in the case before the court, the statute not only retroactively invalidates an act that was within the law when taken but also adds an obligation that did not exist at the time the particular action was taken, the denial of due process is magnified. Taking away one individual's property and giving it to another without due process of law is beyond the sphere of the legislative authority of both the states and the nation. *Osborn v. Nicholson*, 80 U.S. 654 (1871).

The standards applied to determine whether an undue injury would result from retroactive application generally involve consideration of whether there has been an abrupt change in law, whether that change results in substantial prejudice and whether there has been reliance on prior rules.

It is respectfully submitted that an employer is in fact acting in reliance upon prior rules (i.e. rules in existence at the time of action but which are thereafter changed on a retroactive basis) where that employer exercises a right to terminate a plan which right exists

at the precise moment of such exercise. Such a reliance cannot be considered unreasonable where, as in this matter, legislation may be pending but the final exact content of such legislation cannot reasonably be anticipated at that time. The deliberative legislative process involved in enactment of the Multiemployer Pension Plan Amendments Act did not afford an opportunity of fair notice to predict the exact contents of the law as it eventually passed. Passage of any law being considered by Congress cannot be said to be a certainty. Prior legislative experience indicates that very few bills considered by Congress actually become law and even fewer become law in the exact form and substance as originally introduced.

At the point in time of exercise of the vested right, the statute had not been passed, nor could it be said that a definite retroactive date would be or had been firmly established. Under such circumstances, it is entirely reasonable to expect that one may act in reliance on the rules in existence at that time; and that a legislative attempt to retroactively invalidate that action cannot be considered valid.

That there has been an abrupt change in the law is also without question. In commenting on the prior regulation of pension plans, the court below stated that:

“Subjecting parties to some risk of further regulation should not, however, require them to anticipate drastic legislative changes which extract a heavy fine for action taken before the changes win Congressional approval.” *Shelter Framing Corporation v. Pension Benefit Guaranty Corporation*, 705 F.2d 1502 (9th Cir. 1983).

The legislative change insofar as its retroactive application is concerned is indeed abrupt and drastic. In one fell swoop it rolls back existing and vested rights, negates actions taken in reasonable reliance on existing law and creates liabilities where none existed at the time of exercise of such vested rights. Retroactive laws are unconstitutional if they disturb or destroy existing or vested rights as by arbitrarily recreating rights or liabilities already extinguished by operation of law. *Lundquist v. Coddington Bros., Inc.*, 202 F.Supp. 19 (W.D. Wis. 1962).

In *Lundquist*, an Act of the Wisconsin legislature which attempted to revive a cause of action against which a previous statute of limitations had run prior to the effective date of the Act was struck down as an invalid retroactive application of law.

While it is recognized that the constitutional inhibition against laws retrospective in operation does not mean that a statute relating to past transactions can never be constitutionally enacted. Nevertheless due process demands that no law can be allowed to operate retroactively so as to affect past transactions in such a manner as to substantially prejudice the rights of interested parties. Where a right has matured by reason of its lawful exercise, retroactive invalidation is indeed an abrupt and drastic change in the law such as to deprive the exercising party of due process. An abrupt and drastic retroactive change in a law that has been reasonably relied upon is unreasonable, arbitrary and oppressive where it results in substantial prejudice to the party who has exercised that vested right.

The retroactive application to a security interest taken before the date of signing of the new Bankruptcy Code of that Code's avoidance of non-possessory, non-purchase money security interest in personal and household goods has been held to be substantially prejudicial and to constitute a deprivation of due process. *In Re: Pierce*, 4 B.R. 671 (1980). Statutes have been held invalid where they retroactively authorized a change in the preferential standards of holders of preferred shares in a corporation *Wheatley v. A.I. Root Co.*, 69 N.E.2d 187 (1946) or required increased payments for increased periods of time because of unemployment occurring prior to enactment of the statute *General Industries Co. v. Jones*, 100 N.E. 2d 703 (1950). A statute which interferes with rights which have vested prior to its passage was declared unconstitutionally retroactive in *Wood v. J.P. Stevens & Co.*, 256 S.E.2d 692 (1979).

In each of these cases, a statutory attempt to retroactively invalidate an existing and vested right was struck down. The public interest in maintaining stability in the application of laws governing that right was considered paramount. Inequities imposed by retroactive application of law must be weighed and where a decision favoring retroactive effect does produce substantial inequitable results there is ample basis for avoiding the injustice of retroactivity.

II.

THE DELIBERATIVE LEGISLATIVE PROCESS DOES NOT AFFORD AN OPPORTUNITY OF FAIR NOTICE TO PREDICT THE EXACT CONTENT OF FUTURE LAWS WITH RETROACTIVE PROVISIONS THEREBY INTERFERING WITH THE CONSTITUTIONAL RIGHT TO RELY UPON AND ACT WITHIN THE LAW AT THE TIME OF EXERCISE OF VESTED RIGHTS.

The Constitution vests the legislative power of the nation in the Congress of the United States. By its very nature the process of legislating in today's complex commercial-industrial society requires extensive and exhaustive deliberation of the many issues that arise from even the simplest legislative proposals.

Before a bill becomes law it will have traveled on a Congressional journey that starts with introduction of the bill in one house; reference to a subcommittee and/or a committee of that house; report to and action on the floor of that house; transfer over to the other house with reference to a subcommittee and/or a committee of that other house; report and floor action in the other house; possible reference to a conference committee of both houses; floor action in both houses on the conference committee report and finally enactment into law upon signature by the President. The end result of such an extensive and exhaustive legislative process is not so predictable as to permit a cataloging of permitted actions during the pendency of the legislative proposal with any degree of certainty.

The legislative history of the Multiemployer Pension Plan Amendment Act, (*Leg. History - P.L. 96-364*) is particularly illuminating. The first formal introduction of

the legislation that was to become law, albeit a different form and content than that originally introduced, took place on May 3, 1979.

Introduction of the bill was preceded by a series of studies and proposals made by the Pension Benefit Guaranty Corporation to Congress. In September of 1977, PBGC submitted to Congress a study of the potential costs of plan termination insurance for multiemployer plans. In July of 1978 another study was submitted and in February of 1979 a letter was sent to Congress by PBGC recommending legislative action. These studies and recommendations precipitated considerable Congressional debate on the issues involved in multiemployer plan terminations.

When the bill was finally introduced in May of 1979, it included among its many provisions, an effective date for withdrawal liability that was proposed to be retroactive to February of 1979. The bill was considered by the House Education and Labor Committee which amended the bill and reported it out on April 3, 1980. The bill was also considered by the House Ways and Means Committee which amended the bill and reported it out on April 23, 1980. In the Senate the Labor and Human Resources and Finance Committee amended and reported the bill on July 24, 1980. This Senate Committee found the originally proposed effective date to be unnecessarily harsh and amended the bill to change the effective date from February of 1979 to April 29, 1980, the date eventually enacted into law when the bill became a law on September 26, 1980.

The bills reported by the Committee were different in a number of respects from the original PBGC pro-

posal. The House passed one version of the bill and the Senate passed another. In conference, each House accepted part of the other's changes and eventually the bill became law with the April 29, 1980 retroactive date on withdrawal liability. Considering the legislative history of the Multiemployer Pension Plan Amendment Act, the court below found that it "was not certain . . . that the Amendments Act would be enacted and would have a retroactive effect." *Shelter Framing Corporation v. Pension Benefit Guaranty Corporation*, 705 F.Rp.2d 1502 (9th Cir. 1983) at page 1511.

An examination of the "scorecard" for that particular Congressional session is most revealing. In the 96th Congress, 14,592 bills were introduced. Of these, 736 or approximately 5 per cent became law. During consideration of that 5 per cent and indeed, during consideration of the remaining 95 per cent that did not become law, there existed a reasonable uncertainty as to obligations under the law which uncertainty was constantly enlarged upon and magnified as the bills being considered were changed in the normal "give and take" of a legislative session. Fair notice of what provisions a law will contain when it is eventually passed becomes virtually impossible under the circumstances.

In the business world today, an individual must possess ingenuity, industry and tenacity in order to survive and build the business. This is especially true of small business from which so much of the growth of the national economy naturally flows. However, no business, large or small, can reasonably be expected to possess the powers of clairvoyance necessary to make business decisions that will enable it to comply with the law as it may be today; and as it may be today when changed by a law

that may or may not be passed tomorrow; but with retroactive effect. To require decisions to be made and actions to be taken that can be retroactively invalidated by a subsequent enactment of law is to totally paralyze all commercial activity, to unreasonably interfere with vested property rights and to freeze in perpetuity (or at least until Congress may act) the status quo, depriving the party or parties so affected of due process of law.

In *Louisville Joint Stock Land Bank v. Radford* 295 U.S. 555 (1934) where an Act of Congress passed subsequent to an exercise of a vested right by way of foreclosure was involved, this court refused to permit retroactive application of the Act, stating at p.589 that

"Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgage in specific property, another provision of the Constitution is controlling. The bankruptcy power, like the other great substantive powers of Congress is subject to the fifth amendment."

Characterizing the operation of the Act to the particular invalidation of the vested right this court went on to say at p. 590

". . . . the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. . . . Under the bankruptcy power, Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. . . . but it can not take for the benefit of the debtor rights in specific property acquired by the Creditor prior to the Act." (Emphasis added)

The Due Process clause remains as a fundamental limitation to ensure against governmental actions that will effect a confiscation of property rights. Where, as in the matter now before this court, and in all such matters involving the retroactive application of the Multiemployer Pension Plan Amendments Act to *rights exercised prior to passage of the Act*, the guarantees of due process must prevail over the limited powers of Congress to legislative retroactively.

The due process clause clearly places greater limitations upon Congressional power to legislate retrospectively rather than prospectively. *Pension Benefit Guaranty Corp. v. Quimby Corp.* 470 F.Supp. 945 Aff'd 630 F.2d 4, *Cert. denied*, 450 U.S. 914 (1981).

In this case, while ruling in favor of the Pension Benefit Guaranty Corporation on the basis of specific factual issues, the court's comments on the evaluation of the facts before it was to the effect that if it could have been shown that application of the retroactive concept was arbitrary and unreasonable, a different result could have been obtained. Due process of law is of the essence, and no exercise of governmental power can be countenanced if it denies due process to the person affected. Due process operates as a limitation on the power of the legislature to enact laws which are oppressive, arbitrary or unreasonable. A major purpose of the due process clause is to restrain arbitrary and vindictive legislation by seeking to assure that individuals are given fair notice of what the law is and what the effect of their actions will be.

Where there is a lack of fair notice, a fundamental constitutional issue arises. That is, whether Congress

can in the exercise of its legislative power and subject to the limitations imposed by the requirements of due process, retroactively invalidate actions of individuals that were valid when originally taken.

It is respectfully submitted that the legislative route of the Multiemployer Pension Plan Amendments Act did not afford an opportunity of fair notice to predict the exact content of what the law was to be and what the effect of individual actions taken during the deliberative legislative process would be. Legislative consideration of the substantive content of the bill that would eventually become law occupied, at the least, a three year period. The legislative body itself found that the use of one retroactive effective date would be unnecessarily harsh and acted to change that date but in doing so, nevertheless, retained the equally harsh retroactive feature. The use of any retroactive feature that affects the exercise of vested rights, which are undertaken with reasonable reliance on existing law, constitutes a denial of due process. To require individual action or inaction based upon a prediction of future legislative action, especially where the legislative process is one that encompasses a minimum of three years, is a magnification of the denial of due process where that legislative act retroactively invalidates vested rights. Such a retroactive feature must be set aside.

This court, as the ultimate protector of due process, has denied retroactive application of a law where to do otherwise is to impair existing and vested rights. The right of appellee herein to take the action taken with respect to the particular pension plan involved at the time it was taken cannot reasonably be questioned. The power of Congress to retroactively invalidate that action is definitely a serious constitutional question.

CONCLUSION

It is respectfully submitted that the retroactive invalidation of completed acts which constitute the exercise of vested rights produces substantive inequities that violate the demands of due process; that the Ninth Circuit Court of Appeals decision is a logical and reasonable determination of applicable law; and that the decision should be affirmed.

Respectfully submitted,

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